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Supreme Court of the United States

October Term, 1965

No. 766

FRANCISCO PARADA-GONZALEZ,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Jurisdictional Statement

To the Supreme Court of the United States:

FRANCISCO PARADA-GONZALEZ, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered on the 1st day of November, 1965. No opinion was rendered by the said Court of Appeals and the case is not officially reported.

The aforementioned judgment of affirmance (The Panel consisted of the Hon. Irving R. Kaufman and Hon. Paul R. Hays, Circuit Judges and the Hon. William H. Timbers, Chief Judge of the United States District Court for the District of Connecticut sitting by designation of the United States Court of Appeals for the Second Circuit) affirmed

a judgment of conviction of the United States District Court for the Southern District of New York, dated and entered the 21st day of May, 1965 (Hon. Edward Weinfeld, D.J. presiding) which based upon the verdict of a Jury, adjudged the petitioner guilty under the First Count of the Indictment, which charges conspiracy to violate Title 18 of the United States Code, Sec. 1001 and to defraud the United States of and concerning its governmental function and right of administering the Immigration Laws of the United States and sentenced the petitioner to a term of imprisonment of one year (R. 230, 68a, R. 360, 69a).* A co-defendant, Jose Anibal Fojon was found guilty as charged under Count One of the Indictment, which charges the above conspiracy and under Count Two, which Count named him as a defendant alone and charges a substantive violation of Title 18 of the United States Code, Sections 2 and 1001 with regard to a false statement given before the Immigration and Naturalization Service on March 16, 1961. The co-defendant, Fojon was sentenced to a year on each of said Counts, sentences to run concurrently. No opinion was rendered by the District Court.

No petition for rehearing has been made to the United States Court of Appeals for the Second Circuit.

The petitioner has not applied for an extension of time within which to petition for a Writ of Certiorari and the final day for filing such petition is November 30, 1965.

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* Numbers in parentheses preceded by the letter "R" refer to page numbers of the record on appeal. Numbers in parentheses followed by the letter "a" refer to page numbers of the Appendix to the petitioner's brief in the United States Court of Appeals for the Second Circuit.

Jurisdiction is conferred upon the Supreme Court of the United States to review the aforementioned judgment of the United States Court of Appeals for the Second Circuit by Writ of Certiorari under Title 18 United States Code, Section 1254 (1).

Questions Presented for Review

A—Was the petitioner, Francisco Parada-Gonzalez connected to the conspiracy as charged in the Indictment, which charge alleged a conspiracy centering about the marriage of the co-defendant, Jose Anibal Fojon, an alien, to Manuela Ramirez, a citizen of the United States in order to obtain permanent residence as a non-quota alien for Fojon, when all that was shown by the evidence was that the petitioner, Francisco Parada-Gonzalez was acquainted with Jose Anibal Fojon and Manuela Ramirez and introduced them to each other but where there was no showing by the evidence nor could any logical inference be based on the evidence showing petitioner's knowledge that the marriage between Jose Anibal Fojon and Manuela Ramirez would be in form only, fraudulent, nor was there a showing that the petitioner had any knowledge, nor did he advise or abet or aid in the preparation of any application by Fojon with the Immigration and Naturalization Service for Fojon obtaining status as a permanent resident, nor was there a showing that petitioner, Francisco Parada-Gonzalez had any knowledge nor did he advise or abet or aid in the preparation of any application by Fojon or the making of any statements in connection with said application?

B—Did the District Court commit reversible error in denying the motion of the petitioner, Francisco Parada-Gonzalez for dismissal of the Indictment at the close of the Government's case because of the failure of the Government to present a prima facie case and was said error preserved on appeal despite the fact that the petitioner took the stand in his own defense and entered a defense in view of the fact that the Trial Court at the conclusion of the trial admitted that he was confused as to the evidence during the trial and had attributed certain statements made by a co-defendant in the absence of the petitioner to the petitioner at the time said motion was denied?

C—Was prejudicial error committed by the Trial Court in admitting in evidence against the petitioner, Francisco Parada-Gonzalez, Government's Exhibit 6, which is a statement made by Manuela Ramirez before the Immigration & Naturalization Service on March 16, 1961, when there was no showing that the petitioner had any knowledge of said Immigration proceeding with relation to the co-defendant, Fojon, nor was there a showing that Parada-Gonzalez aided, counseled, or in any way abetted or had knowledge of the making of said statement and where the Court at the time that he informed the Jury that said Exhibit was being admitted tentatively against the defendants on trial, further stated that the Exhibit was being admitted in evidence without qualification as against Manuela Ramirez, who was named only as a co-conspirator and who was not named or indicted as a defendant and was not on trial?

Statutes to be Referred to in this Petition

United States Code

"§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

"§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

Concise Statement of the Case

The jurisdiction of the United States District Court for the Southern District of New York was originally invoked because the crime charged, to wit, violation of Title 18 U.S.C. Section 371, which involved a conspiracy to violate Title 18 U.S.C., Section 1001, arose under the laws of the United States and is alleged to have been carried out within the Southern District of New York.

At the trial the petitioner, Francisco Parada-Gonzalez, took the stand and interposed a defense. The co-defendant, Fojon, did not take the stand or present defense witnesses.

The sole count pending against the petitioner is the conspiracy count, Count One of the Indictment, which charges him along with the defendant, Jose Anibal Fojon and Manuela Ramirez, who was named as a co-conspirator but not as a defendant, with the crime of conspiracy to violate Section 1001 of Title 18 and to defraud the Government in its function and administration of the immigration laws and its rights to have the affairs and rights of the Immigration Service free from fraud, deceit, concealment, interference and obstruction. It is charged that said conspiracy consisted of defendants, Francisco Parada-Gonzalez and Jose Anibal Fojon arranging for the marriage of Fojon to Manuela Ramirez, a citizen of the United States, for the purpose of enabling Fojon, an alien, to represent himself as the spouse of a citizen of the United States in order to qualify for non-quota and permanent residence; that it was never intended that the marriage be consummated but that it would be the basis of false and fraudulent statements to be made to the Immigration and Naturalization Service

with regard to the residence of Fojon and his alleged cohabitation with Manuela Ramirez as his wife, so that he would secure an Immigration visa and permanent residence in the United States (R. 281-284, 6a-8a).

At the trial, the sole testimony against the petitioner was the testimony of the conspirator Manuela Ramirez concerning her introduction to the defendant Fojon. According to her testimony, Manuela Ramirez, met the defendant Fojon for the first time at the restaurant owned by the petitioner where she worked as a waitress, some time between Christmas 1959 and New Years of 1960; that she was introduced to Fojon by the petitioner (R. 33, R. 35, 18a, 20a); that later on in the absence of Fojon the petitioner stated that if she would be willing to marry Fojon that Fojon would give her money and that nothing would happen to her; that no one would know about it; that she should do it and that Fojon was marrying her to get his residence in New York; that if she married Fojon, she would have to put his address in her home and that Fojon would give her a divorce within a year (R. 35-41, 19a-24a). Manuela Ramirez further testified that during the first week of 1960, she was again introduced to Fojon by the petitioner who stated that he was the individual whom he had spoken to her about previously (R. 43, 24a). This is the sole testimony in the entire case touching upon the petitioner. The only other testimony against the petitioner was rebuttal testimony of the Government witness Leanza which was intended to rebut the testimony of the petitioner that he had seen Fojon at Apartment 2-E of 1405 Fifth Avenue, New York (R. 168) and that he had seen the name of Fojon on the mail box for said premises during the year 1961 (R. 165).

POINT I

At the trial there was no evidence connecting the petitioner Francisco Parada-Gonzalez to the conspiracy as alleged in Count 1 of the indictment.

From the facts as hereinbefore set forth in the Statement of the Case, there was no evidence upon which to base a presumption or inference that the petitioner had any knowledge that the marriage of the co-defendant, Fojon, to Manuela Ramirez was fictitious, that it would not be consummated and that false statements would be made to the Immigration Service concerning said marriage in an attempt to obtain permanent status in the United States for the co-defendant, Fojon, who was an alien. In the present case the Government has attempted to circumvent decisions both in the Second and Third Circuits.

In *United States* v. *Vazquez,* 319 F. 2d 381 (U.S.C.A. 3rd 1963) judgments of conviction for similar violations as charged in the present indictment were ordered dismissed. In the *Vazquez* case government witness, Maxima Rivera testified to a similar background and similar facts as did the witness, Manuela Ramirez in the present case with the exception that in the Vazquez case said Maxima Rivera stated that as far as she was concerned, she was interested in entering into a bona fide marriage for the purpose of giving a name to her two children. Furthermore, that there was testimony in the *Vazquez* case that the co-appellant, Vazquez introduced said Maxima Rivera to the alien involved; that Vazquez prepared the various papers for the marriage ceremony, the application for

status as a permanent alien resident and the petition for issuance of an Immigration visa. In view of the fact that there was no evidence showing that the wife, Maxima Rivera knew that the marriage was to be in form only, both her conviction and the conviction of the only other appellant, Vazquez were reversed with the directions that judgments of acquittal be entered in their favor, as without her knowledge the proof of the conspiracy alleged failed.

In a case recently decided in the Second Circuit, *United States* v. *Diogo,* 320 F. 2d 898 (U.S.C.A. 2nd, 1963) convictions for violations of Title 18, U.S.C. Sec. 1001 and 1546 as well as the crime of conspiracy to commit said substantive violations were reversed with directions that the indictment be dismissed with regard to all of the appellants. In the *Diogo* case the charges were that the alien falsely represented to the authorities that he actually was married pursuant to a conspiracy. That Court at page 903, stated as follows:

> "* * * We are brought, thus, to the question whether the Government has established that the statements of each appellant regarding his marital status were false, and that these statements were known by the appellants to be false at the time they were made. * * *"

and in answer to this question, the Second Circuit stated at page 909, as follows:

> "* * * We are not called upon to rule on the authorities cited above, that neither appellants nor their respective spouses could secure declarations of nullity with respect to their alleged marriages in the New York courts. It is sufficient to hold, as

> we now do, that the Government has failed, as a matter of law, at the trial below, to sustain its burden of there proving that the marriages were void at the time appellants' representations concerning marital status were made. * * * "

In the present case on the entire evidence, there is no showing that the petitioner Parada-Gonzalez counseled, abetted or aided the co-defendant, Fojon or the co-conspirator, Manuela Ramirez to violate the laws of the United States or the regulations of the Immigration Department. All that is shown is that he introduced the parties and that he may have had the possible belief that from the fact that if Fojon, an alien, would enter into a valid marriage with Manuela Ramirez, a citizen of the United States, that thereby Fojon might obtain permanent residence. There is no showing that the petitioner prepared or helped prepare any forms to be filed with the Immigration Department, that he told anybody to make a misstatement with regard to the Fojon application for permanent status or in fact that he knew that Fojon and Ramirez had made application for permanent status of Fojon, an alien. Also there was no showing that the petitioner knew that said marriage would not be consummated. It goes without saying that had the marriage been consummated there would have been no basis for any prosecution as there would be no basis for alleging a fraudulent marriage.

In short, as no connection was shown connecting the petitioner to the conspiracy by his own affirmative act all testimony as to the doing of the other co-conspirators was not admissible against him and no case was proven.

POINT II

Because of the fact that the District Court was confused as to the evidence at the time that the petitioner moved for dismissal of the indictment at the close of the Government's case, which fact was admitted by the Trial Judge at the conclusion of the entire case, the denial of the petitioner's motion for dismissal of the indictment based upon the Government's case alone is open to review despite the fact that the petitioner interposed a defense and testified in his own behalf.

The same facts and law as urged in Point I are equally applicable to the present point. Despite the fact that the petitioner presented an affirmative case and took the stand in his own behalf, it is submitted that this point is available to the petitioner on review in view of the fact that the Trial Court at the time that the petitioner's motion for dismissal for failure to prove a prima facie case was denied at the close of the Government's case, was confused as to the evidence against the petitioner as appears in the following colloquy had on said motion.

> "(151) The Court: How about Mr. Felix's point?
>
> Mr. Humphreys: Which was that Parada never advised them to make any false statements. I believe Parada did advise Manuela that the reason she was going to do this was to get residence for Fojon in New York. I think it was the way she explained it.
>
> I think that he has put himself into the conspiracy by doing this. In addition, he said, 'He will pay you money.'
>
> He obviously knew there was something wrong. And he said, in addition, there would be a divorce, that Fojon would give her a divorce.

I believe that these are indicia—that 'Nothing will happen to you if you keep quiet'—(152) these are indicia—

The Court: Well, I think, Mr. Felix, it goes beyond what Mr. Humphreys has stated. The witness also stated that in case the Immigration authorities should come that she was to say that Fojon was living there and that they were married for love.

The motion is denied then" (R. 151, 32a).

As appears subsequently from the Record, the Court still remained in error at the close of the entire case:

"The Court: I think my notes indicate there is sufficient to go to the jury. The record, as I recall it, would indicate that your client Parada introduced Fojon to Ramirez and asked if she wanted to marry Fojon, and there was a conversation involving them in which he talked long with her and asked her again if she wanted to marry, that Fojon would give her money if she married him, and your client said nothing would happen to her—she said she would think about it—and she should go ahead and do it and nobody would know anything about it.

And she even inquires as to the object of Fojon marrying her and he, Parada, gave his residence here in New York, and there was more to it than that. The subject of residence after marriage was discussed and Parada, your client, told her if she got married she would have to put Fojon's address at her home or list his address, or some evidence to that general effect, and also—this is still your client—in the (211) absence of Fojon, that he would give her a divorce within one year.

I think there was something also said that in case the Immigration should come to say that he was living there and that she was married for love.

I would think that is clearly enough to let it go to the jury" (R. 210, R. 211, 34a).

However, immediately prior to the submission of the case to the Jury, the Court admitted his error as follows:

> "(215) (The following took place in the robing room, with all counsel present.)
>
> The Court: As a matter of fairness, I want to correct a statement that I made yesterday at the time a motion was made by Parada's attorney for a directed verdict. Particularly since counsel are about to sum up, and particularly since I keep closer notes than counsel, I want to have this clear.
>
> Mr. Felix, when you made your motion yesterday, I detailed the evidence which I felt warranted submitting the case to the jury, and one of the items I referred to was that in one of the conversations, Parada said that Ramirez would not have to live with Fojon and that she (216) would have to put his name on the mail box in order for him to get mail there, and that within a year he would give her a divorce, and also that if the Immigration should come, to say that Fojon was living there and that they were married for love.
>
> Checking on my notes, I think that part of it was the conversation that she had with Fojon in the booth, and I inadvertently referred to it as Parada's conversation.
>
> Now, of course, whatever is in the evidence is in the evidence, but I just think I misstated that part.
>
> In any event, I would say to you that there still is sufficient in the case to go to the jury, as far as your client is concerned." (R. 215, 35a).

It is respectfully submitted that from the foregoing, the right of the petitioner to bring up as error on review the denial of his motion for acquittal made at the close of the Government's case, upon the record as presented on the

Government's case alone, is preserved and that the Government on its case failed to make out a prima facie case against said petitioner.

POINT III

Prejudicial error was committed by the District Court when it allowed in evidence against the petitioner, Government's Exhibit 6 which is a statement made by Manuela Ramirez before the Immigration and Naturalization Service on March 16, 1961, which statement was made in the absence of the petitioner and without his knowledge, advice or consent.

In the course of the trial, a statement given by the alleged co-conspirator, Manuela Ramirez in the absence of both defendants at a hearing before the Immigration & Naturalization Service on March 16th, 1961, was admitted in evidence against said Manuela Ramirez and tentatively against the petitioner, Parada-Gonzalez and defendant, Fojon, subject to motions to strike. At the time the following comment by the Trial Judge before the Jury was made:

> " * * * At this time, we will receive this exhibit without qualification as against Manuela Ramirez, as (21) she is referred to in that exhibit, Manuela Ramirez Fojon, without reservation. The answers that are purportedly contained therein were her answers, and so they are binding upon her at once.
>
> The other two defendants were not present, but since the claim is that there was a conspiracy, if it should be established there is sufficient evidence upon which to determine that a conspiracy did exist, then any statement made by one of the conspirators or any acts performed by any one of the conspirators in furtherance of the conspiracy and during its ex-

> istance is binding on the other persons found to be members of the conspiracy, even though they were not present. * * * " (R. 20-R. 21, 11a).

In addition to the fact that the above exhibit never was connected to the petitioner by any act, was made in his absence, and that petitioner never knew that said statement was being made or in effect did not know of the Immigration proceeding, it is respectfully submitted that the use of the above language by the Trial Court in admitting said exhibit without qualification against Manuela Ramirez was error in view of the fact that Manuela Ramirez was not on trial and was not even named as a party defendant but was merely named as a co-conspirator. Certainly for the jury to have heard that said document was received unqualifiedly as against anybody not on trial or even indicted would in itself be prejudicial and the prejudice was more accentuated in view of the fact that no connection was shown between said document and the petitioner.

CONCLUSION

The petition for certiorari should be granted and this Court, in the exercise of its powers, should order the Judgment of Conviction of the petitioner reversed with direction that judgment of acquittal be entered in the District Court.

Respectfully submitted,

ALLEN S. STIM
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Attorney for Petitioner

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ALBERT FELIX, ESQ.,
Member of the Bar of
the State of New York

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of November one thousand nine hundred and sixty-five.

Present:

HON. IRVING R. KAUFMAN,
" PAUL R. HAYS,
Circuit Judges,
" WILLIAM H. TIMBERS,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCISCO PARADA GONZALEZ, JOSE ANIBAL FOJON,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk